

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

PHH MORTGAGE CORPORATION,

| Case No. 2:16-cv-02822-MMD-PAL

Plaintiff.

5

9 SFR INVESTMENTS POOL 1, LLC, a
10 Nevada limited liability company; LA
11 MANCHA HOMEOWNERS
12 ASSOCIATION, INC., a Nevada non-profit
corporation; LIONEL A. STARKES, an
individual.

Defendants.

15 SFR INVESTMENTS POOL 1, LLC, a
Nevada limited liability company,

Counter-Claimant,

v.

PHH MORTGAGE CORPORATION.

Counter-Defendant.

I. SUMMARY

22 This case arises out of a homeowner association’s (“HOA”) foreclosure and
23 involves the notice provisions applicable to foreclosure sales under Nevada Revised
24 Statutes (“NRS”) Chapter 116. Currently there is a federal-state split in the interpretation
25 and effect of the notice provisions found at the pre-2015 version of NRS Chapter 116.
26 However, a question regarding the applicable notice provisions was recently certified to
27 the Nevada Supreme Court, asking whether the notice provisions found at NRS § 107.090
28 were incorporated by reference into the pre-2015 version of NRS § 116.31168. Because

1 whether PHH Mortgage Corporation ("PHH") received actual notice may be an issue,
2 (ECF No 47 at 2; see ECF No. 53 at 6-7 (stating that the fact the notices were mailed to
3 the Bank and MERS is immaterial without qualifying that it is also disputed)), the Court
4 finds that a partial stay is warranted.

5 **II. STAY**

6 A district court has the inherent power to stay proceedings in its own court. *Landis*
7 *v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). "A trial court may, with propriety, find it is
8 efficient for its own docket and the fairest course for the parties to enter a stay of an action
9 before it, pending resolution of independent proceedings which bear upon the case."
10 *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). In deciding
11 whether to grant a stay, courts should consider "the possible damage which may result
12 from the granting of a stay, the hardship or inequity which a party may suffer in being
13 required to go forward, and the orderly course of justice measured in terms of the
14 simplifying or complicating of issues, proof, and questions of law which could be expected
15 to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005)
16 (quoting *Landis*, 299 U.S. at 268). Courts should also consider "the judicial resources that
17 would be saved by avoiding duplicative litigation." *Pate v. DePuy Orthopaedics, Inc.*, No.
18 2:12-cv-01168-MMD-CWH, 2012 WL 3532780, at *2 (D. Nev. Aug. 14, 2012) (quoting
19 *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997)).

20 The Court finds that significant judicial resources will be saved if the Court refrains
21 from issuing a decision in this case until the Nevada Supreme Court determines whether
22 NRS § 116.31168 incorporates the notice provisions of NRS § 107.090. See *SFR*
23 *Investments Pool 1, LLC v. Bank of New York Mellon*, Nev. S. Ct. Case No. 72931. NRS
24 §§ 116.31168 and 107.090 prescribe two fundamentally different notice mechanisms. The
25 first requires lenders to affirmatively request notice of foreclosure sales from HOAs. The
26 second requires HOAs to notify lenders as a matter of course, regardless of whether a
27 request was made.

28 ///

1 The Ninth Circuit recently held the first mechanism to be facially unconstitutional
2 because it impermissibly shifts the burden to lenders in violation of their procedural due
3 process rights. *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1156
4 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2296 (2017). NRS § 107.090 seems to ameliorate
5 this burden-shifting problem by requiring the HOAs to provide notice to lenders absent
6 any request from lenders for notice; however, the Ninth Circuit has held that NRS §
7 107.090 is not incorporated in NRS § 116.31168. *Id.* at 1159. If it were, the Ninth Circuit
8 reasoned, the opt-in notice scheme would be superfluous. *Id.*

9 The question of whether NRS § 116.31168 incorporates NRS § 107.090 is now
10 pending before the Nevada Supreme Court in Case No. 72931. Moreover, that court has
11 hinted it will answer the question in the affirmative. See *Nationstar Mortg., LLC v. Saticoy*
12 *Bay LLC Series 227 Shadow Canyon*, 405 P.3d 641, 648 n.11 (Nev. 2017). If the Nevada
13 Supreme Court holds that NRS § 107.090 is incorporated, then a factual question would
14 arise in this case: did the HOA provide notice to the lender consistent with NRS §
15 107.090? As the law stands currently, it is irrelevant whether the HOA provided notice to
16 the lender—foreclosure sales conducted pursuant to Chapter 116 could not have satisfied
17 the lenders' constitutional due process rights. See, e.g., *U.S. Bank, N.A. v. Emerald Ridge*
18 *Landscape Maint. Ass'n*, No. 2:15-cv-00117-MMD-PAL, 2017 WL 4386967, at *3 (D. Nev.
19 Sept. 29, 2017). But if NRS § 116.31168 incorporated NRS § 107.090, then some
20 foreclosure sales may have satisfied constitutional due process requirements (i.e., those
21 in which HOAs gave lenders notice consistent with NRS § 107.090). Because actual
22 notice may be an issue here, resolution of the certified question is relevant.

23 **III. LIMITED FACTUAL DISCOVERY**

24 In SFR's Rule 56(d) Motion, it requests to conduct discovery pursuant to Rule 56(d)
25 to "inquire into the Bank's receipt of notice[.]" (ECF No. 31 at 18.) Because the issue of
26 actual notice may be relevant in light of the certified question, the Court grants SFR's
27 56(d) Motion in part to conduct discovery on the issue of actual notice.

28 ///

1 The Rule 56(d) Motion, however, is denied as to SFR's request to conduct
2 discovery as to whether PHH holds the original note. (ECF No. 31 at 16-17.) PHH is not
3 seeking to enforce the note in this action; rather, it seeks a declaration that it is the
4 beneficiary of the DOT and mortgage loan and that these still encumber the Property.¹
5 (ECF No. 1 at ¶ 47.) Moreover, PHH has provided the Court with a copy of the deed of
6 trust listing MERS as the initial beneficiary and a copy of the assignment of the deed of
7 trust from MERS to PHH. (ECF No. 27-1 at 2, 20, 39; ECF No. 27-2 at 2.)

8 **IV. RETURN DOCTRINE MPSJ (ECF No. 29)**

9 SFR moves for partial summary judgment requesting that this Court find that in the
10 wake of *Bourne Valley*, NRS Chapter 116's notice scheme returns to that of the 1991
11 version of the statute and thereby eliminates PHH's affirmative defense and proffer that
12 NRS 116 is unenforceable. (ECF No. 29 at 15.) This Court has already addressed the
13 issue of whether it should analyze the facts of a particular case under the notice provisions
14 of the 1991 version of NRS Chapter 116 and declined to do so. See *U.S. Bank National*
15 *Association v. Thunder Properties Inc.*, No 3:15-cv-00328-MMD-WGC, 2017 WL
16 4102464, *3 (D. Nev. Sept. 14, 2017).

17 Therefore, the Court denies SFR's Return Doctrine MPSJ on the merits.

18 **V. PHH'S SECOND MSJ (ECF No. 46)**

19 The Court addresses two of the three arguments² raised in PHH's Second MSJ:
20 first, that the foreclosure sale cannot extinguish a loan guaranteed by the Veterans
21 Administration ("VA") because the Serviceman's Act preempts the Statute; and, second,
22 the inadequate sale price and sale irregularities warrant summary judgment. (ECF No. 44
23 at 6-8, 10-11.) The Court finds that neither argument has merit and denies PHH's Second
24 MSJ on both grounds.

25
26 ¹The only component of the mortgage loan that may still encumber the Property is
27 the deed of trust. The promissory note is a separate contract between the Bank and the
28 Borrower.

29 ²The Court gives PHH leave to refile its argument that SFR purchased a mere lien
30 interest in the Property (see ECF No. 46 at 8-10) if it so chooses once the stay is lifted.

1 **A. VA Loan**

2 The Borrower's mortgage loan is guaranteed by the VA under its loan guaranty
3 program, 38 U.S.C. § 3703. (ECF No. 46-6.) PHH argues that the "State Foreclosure
4 Statute conflicts with the face of the Servicemen's Act and frustrates the purpose of a
5 federal statute" such that a sale under the Statute is prohibited from extinguishing deeds
6 of trust guaranteed by the VA. (ECF No. 46 at 6-7.) However, the entity in the best position
7 to bring such a contention is the VA itself. *See Freedom Mortgage Corp. v. Las Vegas*
8 *Development Group, LLC*, 106 F. Supp. 3d 1174, 1177 (D. Nev. 2015) (court declining to
9 recognize beneficiary of DOT's prudential standing to challenge the HOA foreclosure sale
10 on behalf of the Department of Housing and Urban Development). Accordingly, the Court
11 finds that PHH lacks standing to assert the VA's rights.³

12 Therefore, the Court denies PHH's motion on the merits to the extent it relies on
13 this argument.

14 **B. Inadequacy of Price and Irregularities in HOA Sale**

15 The Nevada Supreme Court has held that "courts retain the power to grant
16 equitable relief from a defective foreclosure sale." *Shadow Wood Homeowners Ass'n v.*
17 *New York Cnty. Bancorp.*, 366 P.3d 1105, 1110 (Nev. 2016). For instance, a court may
18 set aside a sale where there is inadequacy of price as well as proof of slight evidence of
19 fraud, unfairness, or oppression. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227*
20 *Shadow Canyon*, 405 P.3d 641, 643, 648 (Nev. 2017) (also stating inadequacy of price
21 "should be considered with any alleged irregularities in the sale process to determine
22 whether the sale was affected by fraud, unfairness, or oppression").

23 PHH argues that because the property was valued at \$122,000 at the time of the
24 foreclosure sale, yet SFR paid only \$27,421, and because there were "glaring
25 irregularities . . . present throughout the HOA Sale process[.]" this warrants summary
26 judgment in PHH's favor. (ECF No. 46 at 10-11.) The Court, however, finds that PHH has

27 ³SFR also contends that it is not clear the VA even has a property interest at this
28 point or that it had a property interest at the time of the sale. (ECF No. 54 at 9, 14-15.)

1 not met its burden in showing how these irregularities—which appear to be disputed in
2 part by SFR (see ECF No. 54 at 6-8)—made the foreclosure sale into one “affected by
3 fraud, unfairness, or oppression” either generally or against PHH. See *Shadow Canyon*,
4 405 P.3d at 648. For instance, PHH states that that the HOA’s agent credit bid on the
5 property without the HOA’s authorization for an amount higher than what was listed in the
6 third notice of sale. (ECF No. 46 a 11.) SFR responds that the agent was given authority
7 to credit bid on behalf of the association in the event there were no bidders at the sale.
8 (ECF No. 54 at 6.) Even assuming a mistake or irregularity was committed through the
9 credit bid, PHH does not explain how this amounts to fraud, unfairness, or oppression
10 rather than a miscommunication between the HOA’s agent and itself. Similarly, the fact
11 that three separate liens were recorded with varying amounts owed on each does not in
12 itself manifest fraud, oppression, or unfairness—in fact, SFR points out that the earliest
13 lien had expired by the time the operative lien notice was recorded and that the operative
14 notices included correct information and accurately stated the amount due to the HOA
15 (despite the second lien’s relevant notices containing errors). (ECF No. 54 a 7-8.)
16 Regardless, PHH fails to make clear *how* any of the purported irregularities or mistakes
17 it identifies in its motion demonstrate that the sale was affected by fraud, unfairness, or
18 oppression.

19 Therefore, the Court denies PHH’s motion on the merits to the extent it relies on
20 this argument.

21 **VI. CONCLUSION**

22 The Court notes that the parties made several arguments and cited to several
23 cases not discussed above. The Court has reviewed these arguments and cases and
24 determines that they do not warrant discussion as they do not affect the outcome of the
25 motions.

26 It is therefore ordered that SFR’s Rule 56(d) Motion (ECF No. 31) is granted in part
27 and denied in part.

28 ///

1 The case is partially stayed until resolution of the certified question in Nev. S. Ct.
2 Case No. 72931, at which time the stay will be automatically lifted. In the meantime, the
3 parties are permitted to conduct limited discovery, to be completed within 60 days from
4 the date of this Order, on the matter of whether actual notice was provided by the HOA
5 or its agent to PHH.

6 The parties are directed to file two status reports: (1) within five (5) days from
7 completion of said discovery; and (2) within five (5) days upon the Nevada Supreme
8 Court's resolution of the certified question.

9 It is further ordered that PHH's First Motion for Summary Judgment (ECF No. 27)
10 and SFR's Motion for Summary Judgment (ECF No. 47) are denied without prejudice and
11 may be refiled within thirty (30) days from the date the stay in this case is lifted.

12 It is further ordered that SFR's Renewed Motion for Partial Summary Judgment
13 Regarding a Pure Issue of Law: Application of the Return Doctrine Post-*Bourne Valley*
14 (ECF No. 29) is denied.

15 It is further ordered that PHH's Second MSJ (ECF No. 46) is denied on the merits
16 on its contention that the Serviceman's Act preempts the Statute as well as its contention
17 that the inadequate sale price and irregularities in the recording of notices require this
18 Court to set aside the foreclosure sale. It is denied without prejudice as to its remaining
19 argument and PHH may file a renewed motion to assert this argument within thirty (30)
20 days from the date the stay in this case is lifted.

21 DATED THIS 24th day of January 2018



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE